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No. 90-97



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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AMERICAN HOSPITAL ASSOCIATION,
*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## RESPONSE OF RESPONDENT AMERICAN NURSES ASSOCIATION

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In view of the acquiescence of respondents National Labor Relations Board ("NLRB" or "the Board") and American Federation of Labor and Congress of Industrial Organizations to a grant of certiorari in this case, respondent American Nurses Association ("ANA") does not oppose the American Hospital Association's ("AHA") Petition.[1] We nonetheless consider it important to respond to three aspects of the Petition:

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[1] Pursuant to Rule 29.1 of the Rules of this Court, ANA states that it has no parent or subsidiary companies (other than wholly-owned subsidiaries).

1. The dispositive question in this case (and indeed in litigation in this area generally since the 1974 enactment of the Health Care Amendments Act) is the legal effect, if any, of the nineteen-word statement which appeared in the congressional committee reports accompanying that Act: "Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry." It is our position, and that of the D.C. Circuit in *International Brotherhood of Electrical Workers* v. *NLRB*, 814 F.2d 697 (1987) ("*St. Francis III*"), that this so-colled congressional "admonition" has no legal significance. The *St. Francis III* court summarized its holding as follows:

> We believe that in *St. Francis II* the Board failed to exercise its discretion under section 9 and instead rested its decision on a faulty legal premise. The Board ignored fundamental principles of statutory interpretation when it found that the 1974 Amendments to the Act *mandate* the disparity-of-interest standard. While the House and the Senate Committee Reports and statements by individual legislators express some concern over proliferation of bargaining units in health-care institutions, Congress, in the final analysis, decided against modifying section 9 of the Act. Although legislative history may give meaning to ambiguous statutory provisions, courts have no authority to *enforce* alleged principles gleaned *solely* from legislative history that has no statutory reference point. [814 F.2d at 699-700, emphasis in original, footnotes omitted.] [2]

As the *St. Francis III* decision recognized:

> [T]he Committee Reports' admonition against undue proliferation is *not* part of the Act. While a committee report may ordinarily be used to interpret unclear language contained in a statute, a committee report cannot serve as an *independent statutory source having the force of law.* * * * [*Id.* at 712, emphasis in opinion, footnote omitted.]

Judge Buckley's concurrence in *St. Francis III* succinctly states our position:

> as the admonition and the remarks addressed to it were divorced from the legislation then before Congress, they are an illegitimate source of authority for the agency's construction of the law. *See* maj. op. at 713. [*Id.* at 717.]

The court below (Pet. at 10a) likewise agreed that Congress "does not legislate by issuing committee reports," and that "[t]he admonition in the 1974 committee reports is certainly not a statute." (Pet. at 11a). Rather, the admonition should be regarded "as a commentary on the meaning of the 1974 amendments and hence as equivalent to pre-enactment legislative history"; to read the admonition as a statute "would give the hospital industry something it tried and failed to win from Congress." (Pet. at 12a).

2. Point II of the Petition is not properly before this Court. AHA there argues that the Board's rule impermissibly creates an irrebuttable presumption that the eight bargaining units fashioned by the rule are appropriate. But this is *not* the argument which AHA made in the court of appeals. AHA's "congressional admonition" argument in the court below instead was that the *number* of permissible units under the Board's rule (eight) was illegal. It was, of course, that position which was addressed and rejected in the court of appeals' opinion (Pet. at 8a-14a). In the Seventh Circuit, AHA did not oppose *presumptions as such*; indeed, as that court observed, the industry had before the Board proposed "a rule that would state a rebuttable presumption that the three statutorily separate units are appropri-

[2] AHA thus rewrites history when it asserts (Pet. at i) that the courts of appeals have rejected Board health care unit determinations because they failed to give "proper weight" to the "congressional admonition against proliferation." As the above quotation from the *St. Francis III* decision makes plain, *St. Francis III* was a defeat for the NLRB precisely because the Board in that case had erroneously treated the admonition as though it had the force of law.

ate." (Pet. at 14a). AHA's change of theory in its Petition bespeaks an entirely justified lack of confidence in its position in the court of appeals, but AHA nowhere explains why this Court should deviate from its traditional rule and reach the merits of an issue not raised in the court below. *See, e.g., City of Canton* v. *Harris*, —— U.S. ——, 109 S.Ct. 1197, 1203, n. 5 (1989); *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 23, n. 6 (1983); *Rogers* v. *Lodge*, 458 U.S. 613, 628, n. 10 (1982); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970), and cases cited *id.*

3. As to Point III of the Petition, we note that, merits aside, this Court may conclude upon plenary consideration of the record that "there is no justification for this Court's intervention" (*Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168, 174 [1973]), because this issue is fact-specific and does not involve "principles the settlement of which is of importance to the public as distinguished from that of the parties." *Labor Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951).

## CONCLUSION

If the Petition is granted, the decision of the court of appeals should be affirmed in its entirety.

Respectfully submitted,

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